BRB No. 08-0866 BLA

M.M. Claimant-Petitioner v. NEWTOWN ENERGY, INCORPORATED and BRICKSTREET MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/14/2009 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

George L. Partain (Partain Law Office), Logan, West Virginia, for claimant.

William S. Mattingly and William P. Margelis (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2007-BLA-6006) of Administrative Law Judge Daniel L. Leland rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with thirty years of qualifying coal mine employment, and adjudicated this subsequent claim, filed on October 26, 2006, pursuant to the regulatory provisions at 20 C.F.R. Part 718 and 20 C.F.R. §725.309. The administrative law judge determined that claimant's previous claim had been denied on the ground that the evidence was insufficient to establish that claimant was totally disabled.[1] The administrative law judge found that the newly submitted evidence was insufficient to establish either total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), or the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and consequently, was insufficient to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of complicated pneumoconiosis at Section 718.304, and therefore failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

---

[1] Claimant's original claim for benefits, filed March 27, 2001, was administratively denied on July 22, 2002. Director's Exhibit 1. Claimant took no further action until the filing of the present claim on October 26, 2006.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 12; Hearing Transcript at 13-14.

Claimant first contends that, prior to determining whether a change in an applicable condition of entitlement has been established at Section 725.309(d), the administrative law judge must assume, as a matter of adjudicated fact, that claimant has pneumoconiosis, and thus, must discount any contradictory evidence. Alternatively, claimant contends that the administrative law judge erred in failing to make a finding of fact as to whether or not claimant has pneumoconiosis. Claimant's Brief at 7-15. Claimant's arguments are without merit. In reviewing a subsequent claim, an administrative law judge need initially consider only the issues previously adjudicated against claimant in his prior claim. 20 C.F.R. §725.309(d). In the present case, claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 1. Consequently, in order to obtain review of the merits of his claim, claimant is required to establish this element of entitlement through the submission of new evidence that is sufficient either to meet the standards set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv),[3] or to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c). Once a change in an applicable condition of entitlement is established, the administrative law judge is then required to adjudicate all of the contested elements of entitlement, including the issue of the existence of pneumoconiosis, based on the entire record.

Claimant next contends that the administrative law judge erred in finding that the weight of the newly submitted evidence was insufficient to establish complicated pneumoconiosis at Section 718.304. Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by any other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray." *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*],

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that total disability was not established at 20 C.F.R. §718.204(b)(2), and his finding with regard to the length of claimant's coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at Section 718.304. Rather, in determining whether claimant has established invocation, the administrative law judge must find that claimant has established a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis, by weighing together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). The burden of establishing that the large opacities, as defined at Section 718.304, are due to coal mine dust exposure, rests with claimant. *See Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.).

Claimant does not challenge the administrative law judge's finding that the newly submitted x-ray evidence was uniformly insufficient to establish the existence of complicated pneumoconiosis at Section 718.304(a),[4] but contends that the administrative law judge erred in failing to invoke the irrebuttable presumption at Section 718.304(b), based on Dr. Green's diagnosis, after a review of biopsy slides, of "progressive massive fibrosis with lesions measuring up to 2 cm in diameter." Claimant's Exhibit 2. Claimant also maintains that Dr. Sampath's surgical report of the biopsy is material to a determination of the weight to be accorded to the conflicting pathologists' opinions, and thus, the administrative law judge erred in failing to address Dr. Sampath's findings. Claimant's Brief at 9-10, 15-17. Claimant's arguments lack merit.

In evaluating the biopsy evidence of record, the administrative law judge properly determined that Dr. Barreta's[5] diagnosis of "histologic changes consistent with pneumoconiosis with possible mixed asbestosis and silicosis, and coal worker's- (sic) to be correlated with the occupational history," was too vague to invoke the presumption at Section 718.304(b), because the physician failed to diagnose any massive lesions. Decision and Order at 4, 7; Claimant's Exhibit 4. While Dr. Green diagnosed

[4] The administrative law judge found that the newly submitted x-ray evidence of record did not support a finding of complicated pneumoconiosis, as none of the x-rays was classified as showing Category A, B, or C large opacities. Decision and Order at 7; 20 C.F.R. §718.304(a).

[5] Dr Barreta also identified "fibrous nodules . . . prominent brown black pigment laden macrophages and asbestos bodies . . . tiny silica particles." Claimant's Exhibit 4.

complicated pneumoconiosis,[6] Dr. Naeye concluded that the slides showed no evidence of coal workers' pneumoconiosis, and that there were too few silica particles tiny enough to be fibrogenic so as to produce the fibrosis present in the lungs. Decision and Order at 4; Claimant's Exhibit 2; Employer's Exhibit 2. Recognizing that Drs. Green and Naeye were renowned pathologists with expertise in the field of occupational lung diseases, and that both physicians served on a panel of experts that formulated the diagnostic criteria for complicated pneumoconiosis, the administrative law judge rationally determined that their opinions were of equal weight. Thus, the administrative law judge acted within his discretion in finding that claimant failed to prove that a preponderance of the biopsy evidence supported a finding of complicated pneumoconiosis at Section 718.304(b). Decision and Order at 7; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d 240, 22 BLR 2-554. Any error in the administrative law judge's failure to discuss the report of Dr. Sampath was harmless, as the physician's finding of "pulmonary nodules possibly representing pneumoconiosis," and his statement that the "benign lesion in the right lower lobe is most likely occupational pneumoconiosis," do not constitute a diagnosis of complicated pneumoconiosis, and therefore, would have no impact on the outcome of the case. Director's Exhibit 9; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Lastly, pursuant to Section 718.304(c), the administrative law judge accurately determined that, while Drs. Anderson, Keadle, and Wiot all noted a large density in the right lower lobe on the CT scans of record,[7] none of the physicians identified the density

[6] Dr. Green, however, did not diagnose massive lesions or indicate whether the biopsy findings would equate to a greater than one centimeter opacity on chest x-ray. Claimant's Exhibit 2. The Fourth Circuit has held that an equivalency determination must be made pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, since the statute requires, if diagnosis is by biopsy, that a miner have "massive lesions," which are lesions that would show on an x-ray as opacities of at least one centimeter. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). The Court further noted that the statute requires a diagnosis of "massive lesions" rather than a diagnosis of "massive fibrosis." *Id*.

[7] Dr. Anderson interpreted the December 29, 2006 CT scan and found "an ill defined parenchymal abnormality in the right lower lobe measuring approximately 4.5 x 3 cm" that "may be round atelectasis associated with pleural disease." Claimant's Exhibit 5. Dr. Keadle reviewed the March 16, 2007 CT scan and found an area of increased density in the right lung measuring approximately 3.4 x 4.4 cm, which may represent a persistent infiltrate that has worsened compared with the prior exam; malignancy cannot be excluded. Dr. Keadle also saw multiple micronodules and some larger nodules measuring up to approximately 1 cm that may be related to pneumoconiosis; metastatic nodules cannot be excluded. Claimant's Exhibit 6. Dr. Wiot

as complicated pneumoconiosis, or as arising from coal dust exposure, and no equivalency determination was made in accordance with *Blankenship*. Decision and Order at 7. Regarding the medical opinion evidence, the administrative law judge determined that Dr. Zaldivar opined that the mass in claimant's lower lobe did not represent complicated pneumoconiosis, while Dr. Ranavaya stated that claimant had complicated pneumoconiosis based on his review of the pathology reports and the opacities described on the CT scans of December 29, 2006 and March 16, 2007. Decision and Order at 5-6; Claimant's Exhibit 9 at 8, 31; Employer's Exhibits 1, 7. The administrative law judge permissibly found that Dr. Ranavaya's opinion was not well reasoned and was entitled to no weight, since it was contrary to the administrative law judge's finding that the preponderance of the biopsy reports and the CT scans did not support a finding of complicated pneumoconiosis.[8] Decision and Order at 7 n.2; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.304(a)-(c), we affirm his finding that invocation was not established thereunder.

Because claimant failed to establish total disability through the submission of new evidence pursuant to either Section 718.204(b) or Section 718.304, we affirm the administrative law judge's finding that this subsequent claim must be denied because claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See White*, 23 BLR at 1-7.

---

reviewed the March 16, 2007 CT scan and noted "a large opacity within the right lower lobe," but opined that the etiology of the process was unknown. Dr. Wiot indicated that consideration should be given to metastatic disease, granulomatous processes, or remotely intravenous gout. Employer's Exhibit 5.

[8] Although the administrative law judge did not state whether he credited Dr. Zaldivar's opinion, any error is harmless, as the administrative law judge discredited the only evidence that could support claimant's burden of proof. *See Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge